

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESale PRICE
LITIGATION

THIS DOCUMENT RELATES TO ALL
CLASS ACTIONS

MDL No. 1456

CIVIL ACTION: 01-CV-12257-PBS

Judge Patti B. Saris

**PLAINTIFFS' MOTION FOR LEAVE TO
TAKE ADDITIONAL LIMITED DISCOVERY
AND REQUEST FOR ORAL ARGUMENT**

Pursuant to Fed.R.Civ.P. 9(b) and 26 and applicable case law, Plaintiffs move this Court for an Order granting Plaintiff leave to conduct limited discovery on those matters for which Defendants' claim the Amended Master Consolidated Complaint ("AMCC") fails to satisfy the requirements of Rule 9(b). Plaintiffs contend that this Court's May 13, 2003 Order does not require Plaintiffs to quantify and identify the amount of the spread for each of the AWPIDs identified in the AMCC. However, in the event this Court finds that the allegations set forth in the AMCC do not meet the requirements of Fed.R.Civ.P. 9(b) because it does not specify the amount of the fraudulent "spread" associated with each drug, MDL Class Plaintiffs hereby move this Court for leave to take additional limited discovery of Defendants and for leave to amend the AMCC to include a calculation of such a "spread" for each drug.

MDL Class Plaintiffs request that the Court permit them to obtain discovery into the actual transaction prices associated with each drug and other conduct associated with

Defendants' marketing strategies, information which is solely in the control of Defendants and unavailable to Plaintiffs. Such discovery, and an opportunity to amend, are supported, if not mandated, by *New England Data Servs., Inc. v. Becher*, 829 F.2d 286 (1st Cir. 1987). Plaintiffs cannot calculate a "spread" for each of the drugs in the AMCC without additional discovery from Defendants, because the information consists of actual transaction and pricing data and is therefore, in the words of this Court, "peculiarly within the defendants' control." *United States ex rel. Franklin v. Parke-Davis*, 147 F.Supp. 2d 39, 47 (D. Mass. 2001) (quoting *Boston & Me. Corp. v. Hampton*, 978 F.2d 855, 866 (1st Cir. 1993)); *see also Becher*, 829 F.2d at 292.

Plaintiffs seek narrowly targeted categories of discovery. For each of the drugs listed in the AMCC (each AWP Identified Drug or "AWPID"), Plaintiffs request that the Court order each Defendant to produce the following categories of documents, where such documents were created on or after January 1, 1991:

1. All documents relating to any actual, proposed, or prospective price announcements, price changes, discount programs, rebates, incentives, penalties, or price lists issued by any defendant for each AWPID;
2. All documents relating to the use or provision of free samples, educational grants, marketing grants, volume discounts, rebates, payments for specific data gathering, financial incentives, or other incentive to induce purchases of any AWPID during the relevant time period;
3. For each AWPID, documents sufficient to identify during the relevant time period:
 - (a) AMP (average manufacturer price);
 - (b) ASP (average sales price, *i.e.*, the price after all discounts);
 - (c) EAC (estimated acquisition cost);

- (d) Earned margin (difference between AWP and actual product cost);
 - (e) All documents that relates to discussions of spreads or reimbursement profiles, using AWP as an incentive; and
 - (f) All documents necessary to determine whether the AWP, ASP, AMP and Earned Margin include all rebates, discounts, allowances, chargebacks, on and off invoice adjustments and credits, and any other incentives provided to any third parties;
4. All documents accounting for the free samples given of any AWPID;
 5. Copies of all educational grants provided to any purchasing customer of a AWPID during the relevant period;
 6. All data maintained in electronic form relating to the pricing, cost data and transactional sales, of each AWPID in the United States for the relevant time period, including all rebates, discounts, allowances, chargebacks, on and off invoice adjustments and credits. Such data should be produced in electronic form. Plaintiff would also requests that Defendants produce all documents or instructions necessary to access, process, read and use such electronic data;
 7. All data maintained in electronic form relating to customer invoices for each AWPID, including, but not limited to, customer names and addresses, purchase volume, prices, and discounts for the relevant time period. Such data should be produced in electronic form and include all documents and/or instructions necessary to access, process, read and use the electronic data
 8. All documents evidencing any agreements and performance of agreements between defendants and any one or more pharmacy benefit manager identified in the AMCC relating to one or more AWPID.

In support of this motion, MDL Class Plaintiffs have submitted herewith Plaintiffs' Memorandum in Support of Motion to Take Additional Limited Discovery, the

Affidavit of Thomas M. Sobol in Support of Plaintiffs' Motion for Leave to Take Additional Limited Discovery, and a Proposed Order.

REQUEST FOR ORAL ARGUMENT

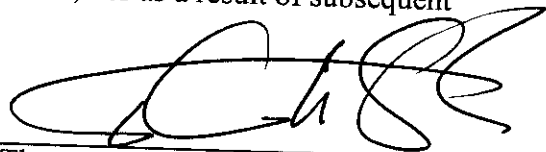
Plaintiffs believe that oral argument on this motion would assist the Court in considering Plaintiffs' motion and respectfully request oral argument on this matter.

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 37.1

Over the last two and one half months, Plaintiffs' counsel has been in contact with each of the Defendants to discuss the scope of discovery and to try to narrow disagreement between the parties concerning the scope of discovery permissible at this stage of the litigation. These efforts include a telephone conference with all Defendants on June 27, 2003 wherein a discussion of documents requests encompassing those documents requested in Plaintiffs' Motion were discussed. No Defendant agreed to produce such information and no further narrowing of the areas of disagreement with respect to these items was possible during that conference, nor as a result of subsequent communications with Defendants.

DATED: September 15, 2003

By



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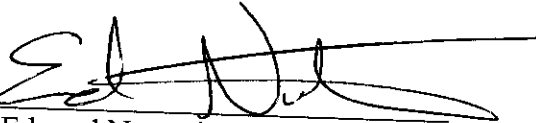
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**ADDITIONAL ATTORNEYS
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CERTIFICATE OF SERVICE

I hereby certify that I, Edward Notargiacomo, an attorney, caused true and correct copies of the foregoing Plaintiffs' Motion For Leave to Take Additional Limited Discovery to be served on all counsel of record electronically, pursuant to Section D of Case Management Order No. 2., this 15th day of September, 2003.

By: 

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